IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1237 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORE CHAMANJI MAVAJI

Versus

STATE OF GUJARAT

Appearance:
MR MB GANDHI for Petitioners
MR KT DAVE, APP, for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 30/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellants herein have preferred this appeal to challenge the judgment and order passed by learned Additional Sessions Judge, Banaskantha, at Palanpur, in Sessions case No.30 of 1992 on November 7, 1992, convicting all of them for offences punishable under

Sections 302, 324 and 325 read with Section 114 of Indian Penal Code (I.P.C.), and Sections 506(2) and 447 of I.P.C.

2. An incident occurred on August 29, 1991 in the outskirts of village Surana, taluka Deodar, district Banaskantha, at about 8.30 A.M. in the field of Dayaram Ramchandra, resident of village Surana. The field is known as Thumbadiwala. As per the First Information Report lodged by Dayaram Ramchandra, on the date of the incident, i.e. on 19.8.1991, at about 8.30 A.M., when he went to the field, he saw that Thakore Chamanji Mavaji, Balvantji Chamanji, Jayantiji Chamanji and Champaben, wife of Chamanji Mavaji were in the field and were erecting a canal (Dhalio) for taking the water to their adjoining field. Their goats were also with them. The complainant-Dayaram, therefore, inquired of Chamanji Mavaji as to why they are erecting the canal without his (complainant's) permission and are causing damage in his field. Chamanji replied that he wants to water his field with the help of this water. Dayaram asked him as to why he had not told him about this earlier. Chamanji, therefore, got angry and started abusing the complainant. He took out a knife from his waistband and assaulted upon the complainant on the right hand with the knife. At that time, Balvantji Chamanji, Jayantiji Chamanji and wife of Chamanji Mavaji clasped the complainant. Balvantji had a pair of iron scissors and a stick in his hands with which he gave blows on head of the complainant and other parts of the body. Jayantiji Chamanji gave stick blows on the left biceps of the complainant and when the complainant started defending, blows were given on the left arm, wrist and palm. Blows were also given on the left thigh with the stick. The complainant, therefore, shouted for help, hearing which Maganbhai Keshabhai and Narayanbhai Rameshwarbhai came, whereafter, the assailants ran away. Maganbhai Keshabhai went to the town and brought his tractor and took him to Deodar, whereafter, he was taken to the hospital at Thara in S.T. Bus, where doctor was not available. Thereafter, the complainant went to the Police Station at Thara and lodged the F.I.R.

2.1 On the basis of the F.I.R., offence was registered and investigation started. The complainant Dayaram took treatment at Deodar, then at Patan, at Mehsana and at Ahmedabad, initially. On the 8th September, 1991, he was taken to Palanpur hospital in an unconscious condition and, ultimately, he died. The investigating agency, after getting the postmortem performed and obtaining a certificate from the doctor,

and collecting other medical evidence, found evidence against the accused persons and, therefore, filed a charge sheet in the Court of learned Judicial Magistrate, First Class, Sihori. Criminal Case No.988 of 1991 was registered in the Court of learned Judicial Magistrate, First Class, Sihori. Since the charges levelled against the accused persons were triable exclusively by a Court of Sessions, the learned Judicial Magistrate, First Class, Sihori, committed the case to the Court of Sessions, Banaskantha, at Palanpur, who registered Sessions Case No.30 of 1992. On the basis of the investigation papers, charge was framed against the accused persons at Ex.3 for offences punishable under Section 302 read with Section 114, Section 324 read with Section 114, Section 325 read with Section 114, Section 504 read with Section 114, Section 506(2) and Section 447 of Indian Penal Code, besides Section 135 of Bombay Police Act. The accused persons pleaded not guilty to the charge. The trial, therefore, was proceeded against them. After the evidence led by the prosecution was recorded, statements of all the accused persons were recorded as required under Section 313 of the Code of Criminal Procedure. After considering contentions raised by the prosecution and the defence, the learned Additional Sessions Judge, came to a conclusion that the prosecution was successful in establishing the charges against all of the four accused persons except charges for offences punishable under Section 504 of Indian Penal Code and Section 135 of the Bombay Police Act. After hearing the accused persons on question of quantum of punishment, the learned Additional Sessions Judge inflicted a punishment of life imprisonment and a fine of Rs.1000/- to each of the accused for offence punishable under Section 302 read with Section 114 of I.P.C. They were further directed to undergo rigorous imprisonment for a period of one year in case of default in payment of fine. So far as offence punishable under Section 324 read with Section 114 of I.P.C. is concerned, the accused persons were ordered to undergo rigorous imprisonment for six months with a fine of Rs.100/-. They were ordered to undergo a further rigorous imprisonment for a period of seven days in case of default in payment of fine.

2.2 The accused persons were ordered to undergo rigorous imprisonment for a period of one year with a fine of Rs.200/- for the offence punishable under Section 325 read with Section 114 of I.P.C. and they were directed to undergo further rigorous imprisonment for one month in case of default in payment of fine. The accused persons were sentenced to undergo rigorous imprisonment

for a period of one year with a fine of Rs.200/- for offence punishable under Section 506(2) of I.P.C. and they were directed to undergo a further rigorous imprisonment for one month in the event of default in payment of fine.

2.3 For offence punishable under Section 447 of I.P.C., the accused persons were ordered to undergo simple imprisonment for a period of one month with a fine of Rs.50/- and they were ordered to undergo rigorous imprisonment for one day in the event of default in payment of fine. All the sentences were directed to run concurrently. Muddamal articles were ordered to be confiscated.

2.4 Aggrieved by the said judgment and order, all the four accused persons have preferred this criminal appeal assailing the judgment and order on various counts.

3. Learned advocate, Mr. Gandhi, appearing for the appellants raised a number of contentions. His first contention is that the evidence led by the prosecution suffers from many infirmities and, therefore, the learned Trial Judge ran into an error in holding that the prosecution had successfully established the charges against the accused persons. The entire story of the prosecution case, if examined, would not inspire any confidence. There are material alterations, omissions, contradictions and lacunas in the prosecution case against the accused which have not been considered and are overlooked by the Trial Court.

3.1 In order to substantiate his arguments, Mr. Gandhi has drawn attention of this Court to the fact that, according to the F.I.R. and the eye-witnesses, at the time of the incident, accused-Chamanji, Jayantiji and Champaben had held the deceased and accused-Balvantji had given blows. Improving upon this story, the witnesses have stated that the deceased was held by Champaben and injuries were caused by the remaining three accused persons. The sequence of events and the manner in which the incident had occurred, therefore, is not brought before the Court truthfully. He submitted that even if what is stated by the eye-witnesses that Champaben had clasped the deceased from behind and that stick blows and blows with scissors were given by the remaining accused persons, then also the event in that manner is not possible, as there is no injury on person of Champaben. If she has held the deceased from behind and if so many injuries are caused with stick and scissors, there is bound to be some injury caused to Champaben also.

Absence of such medical evidence would definitely indicate that the incident had not occurred in the manner in which the prosecution witnesses narrate.

3.2 Mr. Gandhi submitted that the medical evidence, if examined, does not indicate that the injuries found on the person of the deceased were such that they were sufficient in ordinary course of nature to cause death. The injuries found on the person and the narration given by the eye-witnesses to the incident do not corroborate each other. He submitted that death has occurred after a lapse of about 9 to 10 days and the evidence, if examined, indicates that there were intervening circumstances which may have caused death. In spite of medical advice, the deceased was not shifted to another hospital immediately. There is no medical evidence to show as to whether the deceased was taken to Ahmedabad Civil Hospital for treatment. However, witness-Maganbhai Keshabhai states that the deceased was taken to Ahmedabad and was discharged from the hospital after some time as he had recovered and was advised to go for follow up treatment after five days in case of need. Thereafter, after three days from that date, the deceased is taken to the Civil Hospital, Palanpur, in an unconscious condition. Mr. Gandhi submitted that, therefore, the injuries which may have been caused in the incident cannot be held responsible for the death of the deceased and, eventually, the persons causing the injuries cannot be held responsible for the death of the deceased.

3.3 Mr. Gandhi submitted that the medical evidence is to the effect that in event of the injury found in the brain of the deceased is caused, the man would lose conscience and may even go into coma immediately. He would not be able to speak. In light of this definite medical evidence, the story of the prosecution that the death has resulted from the injuries sustained by the deceased in the incident may not be accepted. Extending his argument further, Mr. Gandhi submitted that, besides the above medical evidence, it may be considered that the deceased had recovered from the injuries and was, therefore, discharged from the Civil Hospital, Ahmedabad and was required only to go for a follow up treatment in case of need and, thereafter, he is taken to the Civil Hospital, Palanpur, in an unconscious condition, meaning thereby that the injuries making the deceased unconscious were caused on that day only because the medical evidence shows that immediately on receiving such injuries, a man would become unconscious or may even go into coma. Mr. Gandhi submitted that the prosecution has tried to thrust this injury and resultant death of the deceased on the

heads of the accused persons and the Trial Court has overlooked these aspects.

3.4 Commenting upon the eye-witnesses, Mr. Gandhi submitted that both the eye-witnesses claim to have heard what transpired between the accused persons and the deceased just before the incident. But both of them also admit that their attention was drawn upon hearing the shouts raised by the deceased for rescue. They were at a distance which would require a few minutes to reach the place of incident. Apart from the fact that the witnesses have deliberately tried not to disclose the exact distance by evading answering cross-examination, Mr. Gandhi submitted that distance is such that they could not have heard what transpired between the deceased and the accused persons in the way they claim to have heard. The genesis of the incident is, therefore, not brought on record by the prosecution. Mr. Gandhi submitted that the narration of the incident that is given by the eye-witness is also not believable. In the first instance, it is stated by the witness that a heavy blow with the iron scissors was given on the head of the deceased. Against this, there is no medical evidence of visible external injury on the head. If a heavy blow is given with iron scissors, there is bound to be some indication thereof on the scalps. Mr. Gandhi submitted that the story, therefore, is not believable.

3.5 Mr. Gandhi submitted further that witness-Maganbhai Keshabhai's description of the assault is highly unbelievable. According to him, accused Balvantji was holding a stick as well as a pair of iron scissors in one hand and with both these weapons in same hand, he gave the blow with the scissors. The witness realising the mistake that he had committed has immediately changed the version by saying that while giving the blow, the stick was rested near the shoulder. Mr. Gandhi submitted that this type of assault is unnatural and impossible.

3.6 Mr. Gandhi submitted that, according to the eye-witnesses, the injury was caused with scissors whereas the medical evidence says that injuries found on the person were not possible with muddamal scissors. Mr. Gandhi submitted that the prosecution has tried to fill up this lacuna by examining another doctor. But the dent caused on the prosecution story by deposition of this witness cannot be repaired. When two possibilities are brought on record, one which is favourable to the accused may be accepted.

3.7 Mr. Gandhi submitted that the prosecution story is also to the effect that knife blow was given by accused No.1 to the deceased. There is no injury on person of the deceased which could have been caused with a knife. Under the circumstances, this version of the prosecution also may not be accepted.

3.8 Mr. Gandhi, lastly, submitted that, above all this, there is a defect which would affect the prosecution case materially. Admittedly, the incident occurred at about 8.30 A.M. and, admittedly, the F.I.R. is lodged at 17.00 hours (Ex.45). Mr. Gandhi, therefore, submitted that the F.I.R. is a belated one and is given after deliberation. Mr. Gandhi submitted that the Police Station was not far off nor was the condition of the deceased such that he could not have lodge the F.I.R. immediately. Mr. Gandhi submitted that considering the case of the prosecution as a whole, it suffers from multiple defects, the cumulative effect of which would be that the story would be rendered unbelievable, the benefit of which may be given to the accused-appellants. The appeal may be allowed and the accused-appellants may be acquitted of the charges levelled against them.

4. Mr. K.T. Dave, learned Additional Public Prosecutor appearing for the respondent-State, has opposed this appeal. He submitted that minor discrepancies are bound to creep in. None of the discrepancies indicated by the learned advocate for the appellants would go to the root of the prosecution case and cause damage to the prosecution case, which may be considered as fatal. Mr. Dave submitted that the witnesses tend to exaggerate and add embroidery to their version and this tendency is developed out of fear of being disbelieved and labelled as unreliable or untruthful witness. The Court may not, therefore, give undue importance to such minor contradictions, alterations or omissions.

4.1 Mr. Dave submitted that there is reliable and ample evidence led by the prosecution to indicate the occurrence of the incident. How the incident occurred is also indicated. There is medical evidence to indicate that as many as eight injuries were sustained by the deceased. The deceased may not have succumbed to the injuries immediately, but has ultimately succumbed thereto. The accused persons cannot escape from the responsibility for the death of the deceased. The F.I.R. lodged by the deceased (Ex.45) and the depositions of the eye-witnesses - Maganbhai Keshabhai (P.W.6) and Naranbhai

Rameshwar (P.W.9) corroborate each other on material aspects. There is medical evidence to indicate that the deceased had sustained such injuries which, ultimately, caused the death. The deceased had started vomiting immediately after the incident when he was taken to the hospital. The delay in lodging the F.I.R. is, therefore, explained. Mr. Dave submitted that, if the evidence is closely scrutinized, it indicates that injuries were caused on the head of the deceased and, ultimately, he died because of the injuries. These injuries were caused by accused No.2. Accused Nos.1 and 3 have also caused injuries with knife and stick which are to be found from initial medical certificate and there is evidence to indicate that accused No.4 had helped the deceased from behind to facilitate the assault by other three accused and all of them, therefore, have been rightly convicted by the Trial Court. Mr. Dave, therefore, urged that the appeal may be dismissed and the conviction and sentence may be confirmed.

5. We have been taken through the record and proceedings by both the sides. A close scrutiny of the evidence, in our view, renders the prosecution case doubtful. There are many factors which weaken limbs of the prosecution case one after the other and, ultimately, render it unacceptable.

6. It is true that the complainant in this case has expired and that too, because of head injury. It is true that there are two eye-witnesses, who speak of head injuries having been caused by accused No.2 and, therefore, it sounds very attractive to accept the prosecution case as having been put up by the prosecution. But a close scrutiny of the evidence would indicate that the version by the eye-witnesses cannot be blindly accepted. The contradictions and improvements, though tried to be indicated as natural, to us, they do not seem to be so, but they are made with a view to improve upon the prosecution case and make it suitable so as to provide corroboration to the medical evidence and to derive support from the medical evidence.

7. According to eye-witnesses, the knife blow was given by accused No.1 to the deceased. The deceased was held by accused No.4 from behind and scissors blow was given by accused No.2, whereas a stick blow was given by accused No.3. There are as many as eight injuries found on person of the deceased as per the medical certificate issued by the doctor who treated the deceased initially (Ex.13). There is no injury which could have been caused by a sharp cutting instrument like knife. There is no

incised injury nor is there any stab injury. The prosecution has tried to explain this situation by putting a question to the doctor who states that such injuries are possible with the handle of the knife. If that was done by accused No.1, then, in light of the evidence as to the manner in which the incident had occurred, accused No.1 would have suffered some injuries on his fingers or his palm which is not found. Further, such an absurd behaviour from accused No.1 is not possible. A man, in ordinary course, if he wants to cause injury, would hold the knife by the handle and cause injury with the blade.

7.1 Further, according to the eye-witnesses, accused No.4 had held the deceased from behind while the injuries were caused by the rest of the accused persons. Injuries were caused by accused No.3 with a stick and accused No.2 with iron scissors. If blows are given to the deceased with a weapon like stick or a pair of scissors and if such person is held from behind by accused No.4, in ordinary course, it would be prudent to expect some marks of injury on person of accused No.4, which is not to be found. There is evidence to indicate that there was resistance by the deceased and, therefore, blows could not have been given in a manner which would cause injury only to the deceased and not to the accused holding him. This also renders the deposition of the eye-witnesses doubtful.

7.2 The eye-witnesses stated as to what transpired between the accused and the deceased initially, i.e. to indicate the genesis of the incident. If their cross-examination is seen, they said that they were working at a distance and their attention was drawn only upon hearing the shouts raised by the deceased upon receiving injuries. An impression is created on reading deposition of these witnesses that they are trying to avoid disclosure of exact distance between the place of incident and the place where they were working. But they do admit that it is at a distance. Witness-Maganbhai Keshaji admits that they reached the place after 10 minutes of hearing of the shouts. If this is correct, then he could not have seen the assault while he was at his field nor could the incident have lasted so long. The assailants would not wait for arrival of these witnesses and then cause further injuries. Even as per the F.I.R. the incident has occurred in one transaction with no time gap between the first injury and subsequent injuries. The deposition of this witness, therefore, becomes doubtful. Likewise, if deposition of witness-Naranbhai Rameshwar (P.W.9) is seen, he also

admits in his cross-examination that he learnt about the incident only upon hearing shouts by deceased-Dayaram. In the shouts, no name of the assailants were disclosed. According to this witness, witness-Maganbhai came to his field and they started for the place of incident almost simultaneously. The field of Maganbhai is situate near to the field of this witness and they were working at a distance of about 20 feet from each other. This witness has a unique way of describing time. He says that the time consumed for reaching the place of incident was equivalent to a time that would be consumed in puffing out half a beedi. This witness is not able to give exact time in terms of minutes. He also admits that he has never smoked. This witness also admits that he and witness-Maganbhai reached the place of incident together. He admits that he does not know as to who caused which injury to Dayaram before their reaching the place of incident. He could not see Dayaram from his field after hearing the shouts.

7.3 The above narration would clearly indicate that the version given by these two witnesses cannot be accepted. They were working at a distance which could be covered in ten minutes time on foot. They have not seen the incident from the place where they were working. They started off only upon hearing the shouts to the effect that "Please help, I am going to be killed". Therefore, this leaves no possibility of these witnesses having seen the incident. They could not have heard what transpired between the deceased and the accused prior to the assault. The whole story which is given by these two witnesses, therefore, rolls under a dark cloud of doubt.

8. It was contended by learned Additional Public Prosecutor that apart from the deposition of the eye-witnesses, there is an F.I.R. lodged by the deceased, which has been exhibited which indicates involvement of the accused-appellants in the incident. In this regard, it may be noted that an F.I.R. by itself is not a substantive piece of evidence. The question, therefore, would be whether this F.I.R. can be looked into in light of provisions contained in Section 32 of the Indian Evidence Act. Section 32 of the Indian Evidence Act provides that when a statement is made by a person as to the cause of his death in cases in which the cause of that person's death comes into question, it becomes relevant. In the instant case, as discussed above, it is evident that the injuries sustained by the deceased in the incident were not responsible for death of the deceased. It transpires that the injuries which caused the death must have been sustained in recent past

of his death when the deceased was taken to the hospital in an unconscious state. The medical evidence indicates that in event of such injuries, the man would become unconscious or would slip into a comma immediately. In the instant case, after the incident, the deceased move around and, ultimately, lodged the F.I.R. in question (Ex.45), whereafter, he was taken to hospital wherefrom was sent to Ahmedabad and on recovery, was discharged from Ahmedabad, meaning thereby that the fatal injuries were not sustained by the deceased in the incident. As a necessary consequence, Ex.45 cannot be looked into by resorting to Section 32 of the Indian Evidence Act, as contended, as it does not relate to cause of death. Therefore, the contention cannot be accepted.

9. Apart from this, there are other circumstances which render the prosecution case doubtful.

9.1 There is no medical evidence to show that the injuries were sufficient in ordinary course of nature to cause death.

9.2 According to the eye-witnesses, scissors blow was heavily given on head of the deceased. If a heavy blow with iron scissors is given on the head, the scalp is bound to sustain some injury, which would be visible, which is not the case. There is no external head injury to be found. Further, P.W.13-Dr. Sanjay Kansara (Ex.51) says that injuries found on the head of the deceased were not possible with muddamal article No.2-scissors.

9.3 So far as the internal injuries are concerned, linear fracture is found on right temporal bone. The brain injury that is recorded in the postmortem note by the doctor, is the laceration at the base. Therefore, the head injury which is responsible for death of the deceased could not have been caused with the scissors, as alleged, since as per the ocular evidence of eye-witnesses, the blow with scissors was given on head with right hand.

9.4 It is worthwhile to note that the blood clots that were found of subdural and extradural haemorrhage were reddish black in colour, as per the doctor. The doctor says that, if the injury is recent, the colour would be reddish. The doctor, however, says that he has not made a specific note about the colour of the clots, but that seems to be only an after thought. The result of this would be that the extradural and subdural bleeding was recent from the time of performance of postmortem, i.e. on 9.9.1991. This factum assumes

greater strength in light of the admission made by the doctor that it is possible that such injuries are possible with a fall and which may result into death. This aspect has also to be viewed from an admitted fact by the doctor that, if the injuries which were found on the head are caused, the injured person would slip into coma immediately or would become unconscious. He may not be able to stand and may not be able to speak. In the instant case, therefore, the injuries are possible to have been caused somewhere on the 8th or the 9th September, 1991, i.e. after about eight days of the incident. To put it conversely, the fatal injuries found on the head of the deceased during the postmortem were not the injuries that may have been sustained by him at the incident which occurred on the 29th August, 1991. It would also be appropriate to keep in mind, at this stage, the fact that the deceased was taken to Civil Hospital, Ahmedabad, whereafter, he was discharged on the 5th September, 1991, after recovery and was prescribed and directed to come for follow up treatment after five days, in case of need. The necessary inference, therefore, would be that, he had recovered fully from the injuries that he may have sustained in the incident and then he sustained the injuries found on the base of his brain, which rendered him unconscious and he was taken to Civil Hospital, Palanpur and, ultimately, to which he succumbed. This is the only legitimate and reasonable inference that can be drawn from the evidence led by the prosecution.

10. Mr. Dave, learned Additional Public Prosecutor, has drawn our attention to deposition of P.W.10-Hargovind Ravji, who claims that the deceased had met him and stated about the incident to him. According to Mr. Dave, this is an oral dying declaration before this independent witness and, therefore, may be accepted. There may be some substance in what is stated by Mr. Dave that this oral dying declaration needs to be accepted. But, in view of the foregoing discussion in respect of the medical evidence qua the injuries, we are of the firm view that there is a possibility of the death having not occurred because of the injuries that may have been sustained by the deceased in the alleged incident. This oral statement cannot take place of a dying declaration for the very reason that it does not relate to cause of death of the deceased as discussed in foregoing paragraphs.

11. The statement, therefore, cannot be considered as a dying declaration as it relates to cause of his death or to circumstances of transactions which resulted in his

death. The statement relates to incident on 29.8.1991. As discussed above, the possibility of those injuries being not responsible for death and other injuries being responsible for death cannot be ruled out. The statement before this witness, therefore, cannot be accepted as oral dying declaration. The other injuries sustained by the deceased are simple. The accused persons are already in jail for a period of about nine and a half years and, if period of remission is added, it would be more than eleven years. We do not deem it necessary to discuss the evidence on the question of other minor offences.

12. In light of the foregoing discussion, we are of the view that the prosecution cannot be said to have proved the charges levelled against the accused persons beyond reasonable doubt. They could not have been convicted for the charges levelled against them and, therefore, the appeal deserves to be allowed.

13. The appeal is allowed. The judgment and order dated the 7th November, 1992, passed by the learned Additional Sessions Judge, Banaskantha, at Palanpur, in Sessions Case No.30 of 1992 is hereby quashed and set aside. Appellants No.1, 2 and 3 be released forthwith, if not required in any other case. Bail bond in respect of appellant No.4 will stand cancelled. Muddamal to be disposed of as directed by the Sessions Court.

[MISS R.M. DOSHIT, J.]

[A.L. DAVE, J.]

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